UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of MVM, INC. Employer and INTERNATIONAL UNION, SECURITY POLICE AND FIRE PROFESSIONALS OF AMERICA, (SPFPA)[1] Petitioner and THE INDUSTRIAL, TECHNICAL AND PROFESSIONAL EMPLOYEE'S UNION, AFL-CIO, (ITPE) Intervenor	Case 1-RC-21526

DECISION AND ORDER[2]

The facts of this case are not in dispute. In fact, at the hearing, the parties stipulated that all full-time and/or regular part-time security officers performing guard duties as defined in Section 9(b)(3) of the Act, as amended, employed by MVM, Inc. at the IRS Security locations in Andover and Methuen, Massachusetts constitute an appropriate unit. The parties also stipulated that lieutenants and captains are supervisors within the meaning of the Act. The parties further stipulated that both the Intervenor and the Petitioner are labor organizations within the meaning of Section 2(5) of the Act.

[1] The name of the Petitioner appears as amended at the hearing.

[2] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Since 1997, the Intervenor has represented a unit of guards who work for the Employer.[3] Since around September 2001, the Petitioner has filed several petitions seeking to represent the Employer's guards. Each time, however, the Petitioner withdrew the petition because it was untimely. The Petitioner chose to proceed to a hearing after filing this fourth petition, on July 8, 2002.

The main issue in this case is whether, as the Petitioner contends, the existing collective-bargaining agreement between the Employer and the Intervenor does not constitute a bar to an election in this case. The Petitioner, citing Crompton Co., Inc.,[4] contends that the collective-bargaining agreement between the Employer and the Intervenor is of indefinite duration and, as such, cannot constitute a bar to its petition. The Employer and the Intervenor argue, on the other hand, that the agreement is a bar to the Petitioner's petition because the agreement is for a definite duration of one year as clearly stated in the agreement itself. A secondary issue is Petitioner's contention that the sergeants who are included in the unit are supervisors as defined in Section 2(11) of the Act.

I conclude that the collective-bargaining agreement is a contract with a definite one-year term and, as such, is a bar to the petition. Consequently, I need not decide the issue of whether the sergeants are supervisors within the meaning of the Act.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. A. Facts with regard to the contract-bar issue

In 1997, the Intervenor entered into a collective-bargaining agreement (hereinafter "Agreement") with DGS Contract Services, Inc., the predecessor of this Employer (hereinafter "MVM"). The cover of the Agreement states the effective dates of the

[3] The Employer is a California corporation with a principal place of business in McLean, Virginia and with work sites at the IRS Security locations in Andover and Methuen, Massachusetts, where it is engaged in providing guard services.

[4] 260 NLRB 417 (1982).

agreement as July 18, 1997 through July 17, 1998. Article 18 of the Agreement, entitled 'DURATION,' provides:

> **SECTION A.**
>
> This agreement shall become effective **July 18, 1997** and shall continue in full force and effect until **July 17, 1998** and shall renew itself each successive **July 18** thereafter unless written notice of an intended change is served in accordance with the Labor Management Relations Act, as amended, by either party hereto at least sixty (60) days but not more than ninety (90) days prior to the termination date of the contract.
>
> **SECTION B.**
>
> For the purpose of negotiating changes in wages, group insurance contributions, sick leave, vacation and holidays, as well as changes in or the introduction of other fringe benefit programs, for a covered facility, the parties shall meet on or about **January 1st** of each contract year. If the parties are unable to reach agreement by **April 1st** of each year, either party may terminate this Agreement upon ten (10) days written notice to the other party.

(Emphasis in original). MVM and the Intervenor commonly refer to Section B as the "re-opener clause."

Under the re-opener clause, the parties have subsequently entered into a couple of addenda to the Agreement. On July 14, 2000, DGS and the Intervenor entered into an Addendum to the Agreement (hereinafter the "2000 Addendum") whereby they negotiated wages, health and welfare benefits, pension, vacation, holiday, personal leave, bereavement leave, jury duty leave, uniform allowance, and shift differential premiums for the unit. The 2000 Addendum took effect October 1, 2000.[5]

On August 1, 2001, MVM, as the successor of DGS, entered into a Memorandum of Acceptance (hereinafter "MOA") with the Intervenor. In the MOA, MVM recognized the Intervenor as the exclusive representative of the unit and accepted the terms and conditions of the Agreement and of the 2000 Addendum. Again, pursuant to the re-opener clause, on October 23, 2001, MVM and the Intervenor entered into an addendum where they: 1) agreed that the lieutenants and captains should be excluded from the unit because they are statutory supervisors; and 2) negotiated wages, health and welfare benefits, pension, vacation, holidays, sick leave, bereavement leave, jury duty, uniform allowance, and shift differential premiums for the remaining guards. The changes took effect October 1, 2001.

[5] The Addenda are negotiated to take effect October 1, consistent with the IRS's fiscal year.

Under the re-opener clause, the Employer and the Intervenor agreed to meet from January to April 2002 to renegotiate the Agreement. They negotiated, among other things, adding K-9 officers to the existing unit and specific traffic detail work for the guards in the unit. Some time in April 2002, the parties reached an agreement on these issues. Subsequently, on July 17, 2002, the Employer and the Intervenor completed their negotiations and executed a new collective-bargaining agreement effective July 18, 2002 through July 17, 2005.

B. Analysis and conclusions

The burden of proving that the Agreement is a bar to a representation election is on the Employer and the Intervenor, as they are the parties asserting the doctrine. Roosevelt Memorial Park.[6] Additionally, the Board's contract-bar rules are designed to balance the twin goals of employee freedom of choice and industrial stability. Bob's Big Boy Family Restaurants.[7] "This contract-bar rule provides employees or union petitioners the opportunity to file petitions at reasonable, identifiable times to change or eliminate the employees' bargaining representative if they so desire, and at the same time affords a reasonable period of stability for the contracting parties and employees." Id. To that end, the Board has provided for a window period during which petitions may be filed to be timely with respect to an existing contract. When an employee, or other petitioner, seeks to determine the proper time to file a representation petition, it is axiomatic that one would look first to the existing contract between the employer and the union to determine the appropriate dates for filing such a petition. See Crompton, and cases cited.[8]

The plain language of the Agreement makes clear that it is a one-year contract, effective July 18 through July 17, and that it automatically renews yearly. Employees and the Petitioner are fully apprised, by referring to the text of the Agreement itself, that the window period is the 30-day period running from the 90th day to the 60th day prior to the expiration date of the Agreement. Thus, Petitioner could have filed its petition in the window period of each year of the Agreement. Instead, it waited until July 8, which is clearly within the insulated period of the Agreement, to file its petition.

The Petitioner contends that the April 1 deadline contained in the re-opener clause of the Agreement is a condition subsequent, similar to the one discussed in Crompton, supra, that allows either party to terminate the Agreement at any time after April 1, upon a ten-day notice to the other. The Petitioner contends further that this condition subsequent renders the Agreement one of an indefinite duration. The Employer, on the other hand, maintains that the Agreement is clearly for a definite one-year period, renewable every year and that the re-opener clause has no effect on the expressly stated duration of the Agreement.

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[6] 187 NLRB 517 (1970).

[7] 259 NLRB 153 (1981), enforcement denied on other grounds, 693 F.2d 904 (9th Cir. 1982).

[8] 260 NLRB at 418. See also Suffolk Banana Co., 328 NLRB 1086 (1999).

Crompton is factually distinguishable from this case. In Crompton, an employer and an intervenor, whose most recent collective-bargaining agreement had expired, entered into an agreement that extended their collective-bargaining agreement for sixty days "provided that in any event if the parties hereto reach agreement on a new collective bargaining agreement prior to [the sixty days], said new agreement shall supersede this present agreement or any extension thereof and shall take effect on the effective date provided therefor in the said new agreement."[9] The Board, citing Frye & Smith, Ltd.,[10] concluded that where an extension agreement is qualified by a condition subsequent, it has no fixed term, and, thus, those wishing to file a representation petition are not apprised of the open period.[11] In Frye, the employer and the Intervenor entered into an extension agreement to "maintain the provisions of the expired agreement in effect for a period of 30 days or until a new contract was signed, whichever was sooner."[12] The Board there concluded that the condition subsequent of terminating the contract at the time the parties reached an agreement rendered the duration of the agreement indefinite, and that such a contract could not constitute a bar to a petition.[13]

That is not the case here. Unlike Crompton and Frye, the Agreement had not expired. Moreover, Section B does not supersede nor does it affect Section A, which sets forth the actual term of the Agreement. Section B is not a condition subsequent. Rather, it is simply a re-opener clause that allows the parties to meet, if they wish, to discuss changes to the Agreement. It does not alter the fixed one-year term of the Agreement or the window period during which a petition can be filed.

Having considered the Petitioner's arguments and applicable legal principles, I find no basis upon which to find that the Agreement is for an indefinite period. Accordingly, I find that the Agreement constitutes a bar to an election in this case. I, therefore, do not reach the Petitioner's additional arguments.

ORDER

IT IS HEREBY ORDERED that the petition be, and it is, dismissed.

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[9] Id. at 417

[10] 151 NLRB 49 (1965).

[11] 260 NLRB at 418.

[12] 151 NLRB at 50.

[13] 260 NLRB at 418.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must by received by the Board in Washington by August 16, 2000.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
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Dated at Boston, Massachusetts
this 2nd day of August, 2002.

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